

United States Courts
Southern District of Texas
FILED

MAY 09 2005

Michael N. Milby, Clerk

United States District Court
Southern District of Texas
Houston Division

UNITED STATES OF AMERICA	§	
	§	
VS.	§	Criminal Number H-04-413 S
	§	
RATHNA MEN KING	§	(Judge David Hittner)

Defendant Rathna Men King's Objections to Presentence Report

Defendant Rathna Men King objects to the report of the presentence investigation, on the following grounds:

1. On March 3, 2005, the jury found Defendant King guilty of possession with intent to distribute, and conspiracy to possess with intent to distribute, methamphetamine, Ecstasy, and marihuana.

2. At trial Defendant admitted in his testimony that he conspired to possess with intent to distribute Ecstasy and marihuana (Count One), and that he possessed with intent to distribute Ecstasy (Count Two). Defendant denied that he conspired to possess with intent to distribute, or possessed with intent to distribute, methamphetamine.

3. The Court submitted special interrogatories relating to drug quantities, over Defendant's timely objections, in addition to general verdicts of "guilty" or "not guilty." With respect to both the alleged conspiracy (p. 14) and the alleged possession with intent to distribute (p. 18), the Court instructed the jury that the Government was required to prove a conspiracy to possess with intent to distribute *some substance*, or to possess with

intent to distribute *some substance*, but was not required to “prove that the defendant knew which particular controlled substance was involved” (pp. 14, 18).

4. The Court refused to submit the defendant’s proposed additional instruction following each of the special verdict forms for Counts 1 and 2:

“You cannot answer “yes” to this question unless you believe beyond a reasonable doubt that the defendant knowingly, intentionally, and willfully conspired to possess [the substance] with the intent to distribute [the substance].”

“You cannot answer “yes” to this question unless you believe beyond a reasonable doubt that the defendant knowingly, intentionally, and willfully possessed [the substance] with the intent to distribute [the substance].”

The proposed additional instructions were necessary to make clear to the jury that that the court’s previous instruction on pages 14 and 18 (“The Government . . . need not prove that the defendant knew which particular controlled substance was involved”) did not eliminate the constitutional requirement of proof beyond a reasonable doubt that the defendant possessed or conspired to possess a particular drug and *knew* that he was possessing or conspiring to possess a particular drug. The instructions were also necessary and constitutionally required to make clear that the requirement of jury unanimity was not satisfied unless all 12 jurors agreed the alleged possession and conspiracy involved the same substance. Without the additional instructions, the special interrogatory violated the defendant’s Fifth Amendment right to due process and Sixth Amendment right to a fair trial by jury and to have his knowing criminal conduct proved to the jury beyond a reasonable doubt. The jury’s note evidences its confusion with respect to this error.

5. Accordingly, Defendant objects to the presentence report's calculation of the base level offense (paragraph 75, p. 17), on the grounds that the drug quantities inquired about in the two special interrogatories were never constitutionally determined by the jury's answers to those interrogatories, and cannot be determined now without violating Defendant's right to a jury trial under the Sixth Amendment and to due process of law under the Fifth Amendment. Defendant's sentence therefore cannot be determined using the Guidelines as a "guide" under *Booker*.

6. Defendant asks that the Court sentenced him to appropriate sentences within the statutory ranges prescribed for these offenses.

For the foregoing reasons, Defendant Rathna Men King respectfully moves that the Court sustain his objections to the presentence report.

Respectfully submitted,



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Certificate of Service

I certify that on May 9, 2005, I have served a copy of the foregoing Defendant Rathna Men King's Objections to Presentence Report upon counsel for the Government, and upon the U. S. Probation Officer, at the following address:

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